No. 11405

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# In the United States Circuit Court of Appeals for the Ninth Circuit

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Paul A. Porter, Administrator, Office of Price Administration, appellant

*v.*

Paul Myers, appellee

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## APPELLANT'S BRIEF

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No. 11405

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## APPELLANT'S BRIEF

### JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Arizona in an action by the Price Administrator for statutory damages under Section 205 (e) of the Emergency Price Control Act.[1]

Judgment was entered on March 29, 1946 (R. 28). Notice of Appeal was filed June 3, 1946 (R. 30). Jurisdiction of the District Court was invoked under Section 205 (e) and 205 (c) of the Act (R. 2) and jurisdiction of this Court is invoked under Sec. 128 of the Judicial Code (28 U. S. C. 225).

[1] 56 Stat. 23, 50 U. S. C. App. Supp. 11, Sec. 901 et seq. as amended. 58 Stat. 637, 50 U. S. C. App. Supp. IV, V, Sec. 925 (e).



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## STATUTE AND REGULATIONS INVOLVED

This appeal involves Section 205 (e) of the Emergency Price Control Act of 1942 as amended; Maximum Price Regulation No. 259 (7 F. R. 8950) which establishes maximum prices for domestic malt beverages and the General Maximum Price Regulation (7 F. R. 3153). Pertinent provisions are set forth in the Appendix to this brief, pp. 26 to 32.

## STATEMENT OF THE CASE

Defendant is engaged in buying, selling, distributing, and otherwise dealing in domestic malt beverages as a wholesaler (R. 11). As such, defendant is subject to the provisions of Maximum Price Regulation (MPR) No. 259 (7 F. R. 8959) which became effective November 1, 1942 (R. 11). This regulation superseded the General Maximum Price Regulation (GMPR), (7 F. R. 3153) which had previously held sellers of domestic malt beverages to their March 1942 prices. Section 1420.51 of MPR 259 contains a prohibition against sales of domestic malt beverages above maximum prices set forth in Appendix A of Section 1420.66 of the regulation. (See Appendix to brief p. 28.) Section 1420.66, Appendix A (a) of MPR 259 gave the wholesaler a choice of establishing maximum prices either as of the period October 1 to 15, 1941 inclusive, plus permitted increases set forth in a schedule in paragraph (c) (1) of the Section, or the maximum price established by such wholesaler under the provisions of the General Maximum Price Regulation (GMPR) "plus the 'permitted increase'

for excise taxes only" as specified in paragraph (c) (2) of that Section. (See Appendix, p. 28.)

The complaint charged that between December 1, 1943, and August 26, 1944, defendant violated MPR 259 in his sales of domestic malt beverages at prices in excess of those established by MPR 259 and judgment was demanded in the sum of $28,691.74 (R. 2–5). In his answer, defendant denied the charges of violation; claimed that his sales were at prices which were computed in accordance with business and cost practices established in the industry *prior* to the enactment of the Emergency Price Control Act; and that if committed, the violations were neither wilful nor the result of failure to take practicable precautions (R. 7–9). No trial was had at which evidence was taken, but the parties stipulated the material facts and contentions (R. 10–18).

It was stipulated that the month of March 1942 shall be considered as the base period for the purpose of determining maximum prices and that the proper method of computing maximum prices on brands of beer not sold or offered for sale by defendant during March 1942, but offered for sale and sold by him for the first time subsequent to March 1942, shall be as provided by Section 3 (a) (Section 1499.3 (a)) of the General Maximum Price Regulation (R. 12). Section 3 (a) provides a formula by which a wholesaler may determine his maximum price and requires the seller before the commodity is offered for sale, to report such price to the appropriate field office of the Office of Price Administration. A maximum price so reported

may not be changed by the seller without authority to do so, even though the cost of the commodity increases. (See Appendix, p. 31.)

It was further stipulated that during March 1942 defendant was engaged exclusively in the sale at wholesale of ABC beer and ale, products of Aztec Brewing Company, Inc. of San Diego, California; and it was agreed that for the purposes of determining the maximum price of brands of beer *other* than ABC beer and ale the products of Aztec Brewing Company, Inc. actually handled by defendant during March 1942 shall be considered the "comparable commodity" (R. 12).

It was then stipulated that during the month of March 1942, the cost of return freight on empty bottles and cases was absorbed by Aztec Brewing Company, and not charged to defendant nor paid by him as such and further that during the month of March 1942, the defendant paid no brokerage commissions or finder's fees in connection with the purchase of any malt beverage handled by him during that month (R. 13–14).

Finally, it was stipulated that in computing the overcharges to be $27,426.14 for the period mentioned in the complaint, the Administrator made no allowance for return freight to the brewery on empty cases and bottles or brokerage commissions or finder's fees paid by defendant in connection with the purchase and sale of the commodities for the reason, among others, that no such freight or commissions were paid during the base period by defendant in connection

with the "comparable commodity" being sold during that period (R. 13).

The parties agreed that the overcharges of $27,-426.14 were to be reduced to (a) $23,202.84 or to (b) $18,329.20 [2] depending upon whether the Court found either (a) that "return freight" or that (b) *both* return freight and brokers' commissions and fees paid in connection with the commodities constituted proper elements of net unit cost for the purpose of computing maximum prices under the regulation (R. 15–16).

After a hearing, consideration of the pleadings and stipulated facts, the court below rendered an opinion in which it ruled that judgment should be entered for $18,329.20 (the smallest amount stipulated for by the parties) for many reasons which will be discussed hereafter (R. 23–25). The court made findings of fact in which it adopted the facts stipulated as the facts upon which it based its decision (R. 26–27), and likewise filed conclusions of law in which it held that under the provisions of MPR 259 and the GMPR, the defendant was entitled to include as an item of his costs freight paid on empty containers returned to the brewery and broker's commissions and fees; and that pursuant to stipulation the Administrator was entitled to judgment of $18,329.20 (R. 27–28). From this judgment the Administrator appeals (R. 30).

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[2] That is, the amount of $27,426.14 arrived at by the Administrator was to be reduced by $4,223.30 if return freight alone was a proper element of net unit cost, and by $9,086.14 if both return freight and commissions were proper elements of unit cost (R. 15).

## ISSUE ON APPEAL

The sole issue on appeal is one of law. It is whether the court erred in concluding as a matter of law that in determining his maximum prices under the provisions of MPR 259 and the GMPR, defendant was entitled to include, as an item of his costs, freight paid on empty cases and containers which defendants returned to the brewery, and likewise broker's or finder's fees paid by him to purchase the beer, where it is undisputed that such costs and charges were absorbed by the seller during the base period and where defendant adduced no proof to show that subsequently his new supplier's maximum prices as fixed by the Office of Price Administration included such charges.

## SPECIFICATIONS OF ERROR

1. The court erred in concluding as a matter of law that pursuant to the provision of MPR No. 259, and in particular pursuant to Section 3 (a) (Sec. 1499.3 (a)) of the General Maximum Price Regulation (7 F. R. 3153), the defendant was entitled to include, as an item of his costs, his freight paid on empty cases and containers which defendant was required to return to the brewery in order to purchase the beer; and further was entitled to include as an item of his cost, the broker's or finder's fee paid by him to purchase the beer.

2. That the court erred in failing to hold as a matter of law that defendant was not entitled to include as an item of his cost, either the freight paid by him on empty cases and containers, which defendant was

required to return to the brewery in order to purchase beer, or the broker's or finder's fee paid by him to purchase the beer.

3. That the court erred in failing to award judgment for plaintiff for at least $18,329.20, plus the freight paid by defendant on empty cases and containers which defendant was required to return to the brewery in order to purchase beer and the broker's or finder's fee paid by him to purchase the beer.

## ARGUMENT

**The applicable regulations were violated when a wholesaler of beer made a charge for freight on cases and containers returned to a brewery, for broker's commissions and finder's fees where such charges were not made during its base period on sales of "comparable" beer, and where the defendant adduced no proof to show that subsequently his new supplier's maximum prices as fixed by the Office of Price Administration included such charges**

The defendant admittedly sold beer after the effective dates of MPR 259 and the GMPR at prices higher than the highest price at which it sold comparable beer during March, 1942, its base period. The difference between its base period prices and its subsequent prices covered the freight cost for return of empty cases and bottles to the brewery, brokerage commissions and finder's fees, none of which charges were paid by the buyer on "comparable" beer during the base period and all of which were absorbed by the supplier during this period. The sole question here is whether the regulation permitted these additional charges to be made where they were not made during the base period, and where defendant failed to prove

that subsequent to the base period, his new supplier's maximum prices as fixed by the Office of Price Administration included such charges.

It was stipulated that March, 1942, be considered as the base period and that the proper method of computing the maximum prices on brands of beer not sold by defendant during the base period, but sold for the first time subsequent to March, 1942, shall be as provided by Section 3 (a) (Section 1499.3 (a) of the GMPR). A seller is relegated to Section 3 (a) of the GMPR if he is unable to use Section 2 (1499.2) of that regulation. Section 1499.2 of the GMPR provides that the seller's maximum price for any commodity shall be the highest price charged for the same commodity during March 1942. If the seller did not deal in the same or similar commodity, Section 1499.2 provides that the seller's maximum price shall be the highest price charged during March 1942, by the most closely competitive seller of the same class for the same commodity, and if no charge was made for the same commodity, for the similar commodity most nearly like it (see p. 30, *infra*). If the seller's maximum price for the commodity cannot be priced under Section 1499.2 of the GMPR, the seller must determine his maximum price according to a formula provided by Section 1499.3. By stipulation, as shown above, defendant's sales without dispute fall within Section 3 (a) (1499.3) of the GMPR. This Section provides in part as follows:

> (a) *Sales at wholesale or retail.* In the case of a sale at wholesale or retail, the seller (1)

shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under § 1499.2 of this General Maximum Price Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his replacement cost of that commodity; and (3) shall multiply the percentage so obtained by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the appropriate field office of Price Administration upon a form, duly filled out and signed under oath or affirmation, copied from the form contained in § 1499.24, Appendix A, of this General Maximum Price Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

"Replacement cost" is defined as follows:

(n) "Replacement cost" shall be the net price paid by the seller after May 18, 1942, or the net price which the seller would have to pay to replace such commodity after such date.

Section 1499.3 (a) is designed to allow to the seller as a mark-up, the percentage differential between the seller's maximum price for the comparable commodity dealt in by him during March, and his supplier's maximum price to him for replacement of that article.

It was stipulated that during the month of March

1942, the cost of returned freight on empty bottles and cases was absorbed by Aztec Brewing Company (the supplier) and was not charged to the defendant nor paid by him as such, and further that during the month of March 1942, defendant paid no brokerage commissions or finder's fees in connection with the purchase of any malt beverage handled by him during said month (R. 13–14). Under the provisions of MPR 259, if a seller or supplier made no charges for returned freight on empty bottles and cases during the base period, and also imposed no brokerage commissions or finder's fees, it was bound by that practice in its subsequent transactions, unless it obtained authority from the Office of Price Administration to make these extra charges. Defendant, however, made no such showing and from his answer, it does not appear that he relied on the theory that his new supplier was authorized to include freight returns and broker's and finder's fees. That being the case, and in the absence of any evidence in the record that defendant's new suppliers had authority to include these charges in its prices to defendant, the latter could not lawfully pay these charges to the supplier after the regulation became effective. By the same token, defendant's "net price," within the meaning of Section 3 (a) of the GMPR, could not properly include these charges. Obviously, "net price" does not mean the net price paid by the seller to the supplier irrespective of the character of the charges. Net price can mean

only legal net price and include only lawful charges.[3] Otherwise, in a tight market, a supplier could charge a wholesaler any number of additional charges which the latter would "joyfully" pay (cf. *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431, 434 (C. C. A. 9th) certiorari denied October 14, 1946) on the theory that those charges could always be included in the formula provided by Section 3 (a) of the GMPR, and thereby passed on to the purchaser. On that basis, a wholesaler could even be reimbursed for unlawful "side" payments made to a supplier. Such a construction of the regulation cannot be accepted, for it would thwart the manifest purposes of the Act in curbing inflation and operate as an invitation by every seller to violate (cf. *Batson* v. *Porter,* 154 F. 2d 566, 568 (C. C. A. 4th).

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[3] Sec. 302 (i) of the Act defines "maximum price" as the "maximum *lawful* price" for a commodity.

In *Gold-Form, Inc.,* v. *Bowles,* 152 F. 2d 107, 111 (E. C. A.), the court said:

"In the absence of a showing that the prices which these competitors were alleged to be charging for a similar garment were established *in accordance with the pricing rules contained in the regulation,* there is no basis for complainant's contention that the price for its garment should be fixed in line with the level of the prices of these competitors." [Italics ours.]

And in *Pacific Gas Corporation* v. *Bowles,* 153 F. 2d 453, 456 (E. C. A.), the court said:

"Moreover, complainant did not show that Warren's maximum prices, which complainant had allegedly adopted pursuant to Section 5.3, were maximum prices which Warren had *properly* determined under Section 5.2." [Italics ours.]

There is persuasive proof in the history of MPR 259 to rebut the notion that the defendant made a lawful charge for return freight on empty bottles and cases and broker's commissions or finder's fees in this case. In the initial form of MPR 259, the increases to be added to maximum prices established by the General Maximum Price Regulation (if that was the pricing method chosen by the seller) were the "permitted increases for excise taxes only." On its face, therefore, the regulation did not permit any additional charges to be made for return freight or broker's or finder's fee between December 1, 1943, and August 26, 1944, the period of violation charged in the complaint (R. 3). On December 12, 1944, the Price Administrator reaffirmed this intention with the issuance of Revised Maximum Price Regulation 259 (9 F. R. 14537), which superseded Maximum Price Regulation 259. Section 5.9 (a) of RMPR 259 forbade sales of beer at prices above the maximum prices established by the regulation (*infra*, p. 29). Section 5.9 (b) (1) carried a general prohibition against evasion "by commission, brokerage or finder's fee, service, transportation or other charge * * *" and Section 5.9 (b) (2) contained specific acts which constituted an evasion. Among these was Section 5.9 (b) (2) (iii), which read as follows:

> Making a separate charge by a seller to a purchaser for local hauling or handling, loading or unloading, for breakage of barrels, containers or cases, for reconditioning barrels, containers or cases, or *for hauling or handling empty barrels, containers or cases.* [Italics ours.]

The Statement of Considerations accompanying this regulation provided the following explanation for this provision:

> Certain other transactions or acts constituting violations or evasions of the new regulation are prohibited * * *. Finally, local hauling or handling, loading or unloading, breakage of barrels, containers or cases, or their reconditioning, hauling or handling, may not be made the subject of separate charge. *Maximum prices contain compensation to the seller for normal expenses of that latter type.* In individual instances of exceptional expense of that nature, its origin is generally a change in normal marketing practice the seller has found it desirable to make. Acceptance of benefits of such change should carry with it corresponding burdens. [Italics ours.]

Up to that point, the regulation still made no provision for inclusion of transportation charges on the return of cases and empty containers as an element of the cost of acquisition, since it was commonly known and accepted that maximum prices included compensation to the seller "for normal expenses" of that type. The first instance where "transportation charges" are defined by the Administrator to include charges for the return of empties appears on December 27, 1944, when Amendment 2 was issued to Revised Maximum Price Regulation 259 (9 F. R. 15107) amending Section 1.2 (n) of that regulation (now Sec. 1.2 (p)) by adding the following paragraph at the end thereof:

> The term "transportation charges" shall also include charges for the return of cases and

> empty containers, *only where the seller imposed such a charge* on a particular class of purchaser *during the applicable base period* or where the seller did not ship outside his local area during the applicable base period and now establishes a maximum price to a new class of purchaser located outside his local area * * *. [Italics ours.]

The Statement of Considerations which accompanied this amendment indicates clearly that while it was a customary practice during the base period for some producers and some sellers of beer to require purchasers to pay transportation charges incident to the return of cases and empty containers, *that the regulation made no provision for the inclusion of such charges as an element of the cost of acquisition.*[4] By

[4] The statement of considerations read in part as follows: "The attention of the Price Administrator has been directed to the fact that it was the customary practice during the base period for some brewers and other sellers of malt beverages to require purchasers to pay transportation charges incident to the return of cases and empty containers, and that those purchasers historically included as part of their cost the return freight charges thus paid.

*The regulation, however, made no provision for the inclusion of the transportation charges incurred on the return of cases and empty containers as an element of the cost of acquisition to which the markup factor is applied.* A review of the results of the Bureau of Labor Statistics Survey indicates that the margins were computed from a base cost which includes as an element of cost, return freight on cases and empty containers. Consequently, in order properly to reflect the results of the Bureau of Labor Statistics Survey, appropriate provision has been made to permit sellers to include in their cost of acquisition return freight on "empties" *where that charge was imposed on them during the base period* or where the seller during the base period sold only in his local area and now establishes a maximum price to a new class of customer located outside that area." [Italics ours.]

this amendment, however, appropriate provision was being made to permit sellers to include in their cost of acquisition "returned freight on empties," but "only where the seller imposed such a charge * * * during the applicable base period."

Similarly, as shown above, at no time were brokerage commissions or finder's fees permissible under the regulation which were not paid in the base period. MPR 259 was express in its provisions to prevent the use of brokers to shift to purchasers those selling expenses which the seller's maximum price usually covered.

It was to cope with this kind of practice that Section 1420.57 (a) was included in MPR 259. That section read as follows:

> *Evasion.* (a) The price limitations set forth in this Maximum Price Regulation No. 259 shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitations, agreement, sale or delivery of, or relating to the sale of domestic malt beverages alone or in connection with any other commodity, or by way of *commission, service, transportation* or any charge, or discount premium or other privilege, or by tying-agreement or other trade understanding or otherwise. [Italics ours.]

The disruptive effect upon price control of brokerage activities having their origin in supply shortage was likewise noted when Revised Maximum Price Regulation 259 superseded MPR 259 on December 12, 1944 (9 F. R. 14537). Provision was made for payment to brokers in Section 5.3 under certain circum-

stances, with an admonition that the broker was to be "considered the agent of the seller, not the agent of the purchaser." [5]

The Statement of Considerations said the following respecting this provision:

> The new regulation contains provisions designed to prevent use of brokers to shift to purchasers selling expenses which the seller's maximum price is designed to cover. The Price Administrator has previously had occasion to discuss the disruptive effect of brokerage activities having their origin in supply shortage and the considerations motivating action to prevent that result need not be repeated * * *. Newly initiated practices of that character ordinarily result in the seller's receiving and the purchaser's paying a consideration in excess of the applicable maximum price or involve evasion of the regulation * * *.

On the basis of the stipulated facts in this record, the plain language of the regulation, and sound considerations supporting it, there can be little question but that the price limitations set forth in MPR 259

[5] Sec. 5.3 *Payment of brokerage.* Every broker shall be considered the agent of the seller, and not the agent of the purchaser. In each instance, the amount paid by the purchaser to the seller, plus any amount paid by the purchaser to the broker, shall not exceed the seller's maximum price including allowable charges actually paid by the seller or by the broker. In other words, the seller may not collect from the purchaser any more than the maximum price including allowable charges, less any amount the purchaser pays the broker. * * *

As used in this section, "broker" means a person acting as intermediary between a seller and a purchaser. It includes, but is not restricted to, a "finder," "buyer's agent," and "seller's agent."

were being evaded by defendant either directly or indirectly by way of both "commission" and "transportation * * *." (Sec. 1420.57 (a).)

However, for many reasons which we will now discuss, the court below refused to adopt the fair and reasonable construction of the regulation which the Administrator had consistently placed upon it, or to give any weight to the statements of considerations which were in harmony with it.

*Consideration of reasons assigned by court below*

(1) The court declared that "net unit cost includes any cost lawfully charged by a supplier and paid by a seller such as the defendant herein" (R. 23). We concede the correctness of this statement. The question is, does it apply to defendant's sales in this case? Defendant adduced no proof whatever to show that the supplier charged the defendant with the cost of return freight on empty bottles or with brokerage commissions or finder's fees, and defendant also failed to show that the supplier was authorized by the Office of Price Administration to make such charges. Yet, that was a burden which defendant was obliged to discharge after the Administrator had made out a prima facie case by showing that the cost of returned freight on empty bottles and cases was "absorbed" by the supplier during the base period, "and not charged to said defendant nor paid by him" and further that during that period, the defendant paid the supplier no brokerage commissions or finder's fees in connection with its purchases of malt beverage

(R. 13–14). Under familiar principles, in the absence of evidence to the contrary, we must presume that a condition which has been shown to exist, has continued. (*National Labor Relations Bd.* v. *National Motor B. Co.,* 105 F. 2d 652, 660 (C. C. A. 9th); *Kortz* v. *Guardian Life Ins. Co.,* 144 F. 2d 676, 678 (C. C. A. 10th), certiorari denied, 323 U. S. 728;[6] *National Labor Relations Board* v. *J. G. Boswell Co.,* 136 F. 2d 585, 589 (C. C. A. 9th).)

(2) The court's second reason is that "defendant's new supplier's maximum price as fixed by the Office of Price Administration included return freight on empty beer bottles, and such new supplier property charged return freight on empty beer bottles" (R. 23). This record will be searched from end to end in vain for even the semblance of any proof that defendant's supplier obtained authority from the Office of Price Administration to increase its prices as to include return freight on empty beer bottles. And the record is equally barren of proof that the new supplier "properly" charged defendant with return freight on empty beer bottles and containers. As has been indicated at pages 12 to 13, such charges were not per-

[6] In *Kurtz* v. *Guardian Life Ins. Co.*, *supra*, the court said:

"Though the judgment in the former action does not constitute res judicata or an estoppel here, the pleadings and judgment were admissible in evidence as proof of the existence of disability at that time. The insured introduced in evidence copies of the complaint and the judgment. And they constituted a conclusive showing of disability at that time, gave rise to a presumption that it continued in the future, and *shifted the burden to the company to go forward and show by a preponderance of the evidence that the condition no longer existed.*" [Italics ours.]

missible prior to December 27, 1944. Hence, if the supplier imposed these charges prior to that time, they were unauthorized under the regulation and, therefore, were not lawful charges to be included in defendant's net cost.

(3) For the reasons discussed above under (1) and (2), the court's statement that "the return freight on empty beer bottles as charged by the new supplier is an item to be included in the defendant's net unit cost" cannot be sustained.

(4) For its fourth reason, the court declared that defendant, though including return freight on empty beer bottles, and though including finder's fees in fixing his maximum price on the new commodity as items of net unit cost, nontheless continued his customary allowance, discounts, etc., to his customers (R. 24). We fail to see the materiality of this reason. Whether or not defendant continued his customary allowances and discounts to his customers on sales of beer subsequent to the base period, is of no relevancy to the question in dispute as to whether he could charge for return freight and broker's commissions and finder's fees.

(5) As a fifth reason, the court states that "broker's or finder's fees were not prohibited during the period charged to have been unlawfully included by the defendant as an item to be included in defendant's net unit cost" (R. 24). The regulation did not permit broker's commissions or finder's fees, and unless defendant can show that its supplier was authorized by the Office of Price Administration to include such

charges in its sales to defendant, defendant could not include these charges in its net unit cost. Needless to say, proof on this score was lacking.

(6) Nor is it of any materiality that defendant failed to increase its profits by including return freight on empty beer bottles and finder's fees in the net unit cost of the eastern beer (Reason 6, R. 24). The test in determining whether a regulation has been violated is not whether a seller has profited from a transaction. The sole test is whether the commodity is being sold in excess of the ceiling price established by the regulation. "The Act does not require * * * that a regulation shall protect each individual member of the industry in the enjoyment of his customary profits" (*Philadelphia Coke Co.* v. *Bowles,* 139 F. 2d 349, 355) (E. C. A.). On the theory suggested by the District Court, there could be no violation in any part of the chain of sellers, since each could pass on to the other an overcharge made in the first instance in order to preserve the normal profit. Plainly, if this were the case, there could be no price control.

(7) Equally lacking in merit is the reason assigned by the court below that the purpose of the Act is to eliminate and prevent profiteering, and that it "enjoins any order or regulation requiring the determination of costs otherwise than in accordance with established accounting methods" (R. 24). The court was obviously referring to Section 2 (h) of the Act, which provides as follows:

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or

> methods, or means or aids to distribution, established in any industry, * * *.

Proof that a particular regulation issued by the Administrator produces the effects forbidden by Section 2 (h) would require a holding that the regulation is invalid. The validity of a regulation is, however, a matter which lies within the exclusive jurisdiction of the Emergency Court of Appeals and cannot be litigated in this proceeding. In this court, the regulation must be accepted as valid (*Bowles* v. *Sanden & Ferguson,* 149 F. 2d 320, 321 (C. C. A. 9th); *Henderson* v. *Burd,* 133 F. 2d 515, 517 (C. C. A. 2d); *United States* v. *Pepper Bros.,* 142 F. 2d 340, 343 (C. C. A. 3d); *Bowles* v. *Mannie & Co.,* 155 F. 2d 129, 133 (C. C. A. 7th), certiorari denied October 14, 1946).

(8) What was said of the court's sixth reason may be said of the court's eighth reason, that "the Act is primarily designed to prevent inflation by controlling profit * * *." The purposes of the Act are to check unwarranted *price* increases. It is not concerned with profit. The Statement of Considerations involved in the issuance of the General Maximum Price Regulation, under which the defendant in this case was supposed to determine its maximum prices, sets forth these purposes very clearly.

> *1. Breadth of the Regulation.*—The imminence of price increases throughout the economy requires price control which is likewise made generally effective. There are inflationary pressures on prices everywhere. And so everywhere that prices exist there must be controls to prevent them from rising any further.

Retail prices cannot be held down if costs to retailers are left free to rise without limit. There must be control of manufacturers' and whosalers' prices. And at all levels—retailer, wholesaler, and manufacturer—the control of the prices of cost-of-living items must be based upon control of the prices of all the commodities that enter into the costs of those items. The interdependence of prices, when prices are rising generally, prohibits any possibility of piecemeal control.

Even where prices do not affect each other directly, as costs, they affect each other indirectly. To control the price of more essential products and leave the price of less essential products uncontrolled at best involves arbitrary distinctions. A limited Regulation would obstruct the concentration of men and materials in the most important uses. In war, that concentration is of vital importance.

*2. The base period.*—The core of the General Maximum Price Regulation is its requirement that each seller charge no more than the prices which he charged during the base period, March 1–31, 1942. The basic fairness of this approach is that it catches hold of the price structure during a given period and holds it fast until a judgment can be made as to what adjustments, if any, are needed. The Regulation accepts the level and relationships of prices worked out by the buyers and sellers of the commodities at various economic levels. This is fair and reasonable. Certainly it is a sufficient basis for a price stop which is offered as a general regulation subject to future refinements and allowances for gross inequities.

And the authorities which have construed this regulation have consistently held that whether an individual is deprived of profit by impact of a wartime regulation is of no materiality (*Philadelphia Coke Co.* v. *Bowles,* 139 F. 2d 349 (E. C. A.); *United States Gypsum Co.* v. *Brown,* 137 F. 2d 803, 807 (E. C. A.) certiorari denied 320 U. S. 799; *Galban Lobo Co.* v. *Henderson,* 132 F. 2d 150, 152 (E. C. A.) certiorari denied 63 S. Ct. 530). We might add, however, that if the regulation in this case worked a hardship upon defendant, adequate remedies were provided in the regulations by which he could obtain an adjustment (cf. *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 419. See also *Bowles* v. *Nu Way Laundry Co.,* 144 F. 2d 741, 748 (C. C. A. 10th) certiorari denied 65 S. Ct. 431).

(9) Our comment to the eighth reason applies as well to the court's ninth reason, that "the Act contemplates increases in costs with resulting increases in ultimate prices, but intends that profits shall not increase." The core of the General Maximum Price Regulation is its requirement that each seller charge no more than the prices which he charged during the base period. The seller is bound to this base period, even though wages, rents, taxes, or materials increase in price, unless and until he applies for and obtains an adjustment of prices (see cases cited p. 22). The basis of the General Maximum Price Regulation is that it "catches hold of the price structure during a given period and holds it fast till judgment can be made as to what adjustments, if any, are needed."

As indicated at pp. 21–22, *supra,* there is present in the regulation adequate leeway for future refinements and allowances for hardship cases, and the Supreme Court has indicated that this is a sufficient basis for a general regulation of this character (*Bowles* v. *Seminole Rock & Sand Co., supra;* see also, *Bowles* v. *Willingham,* 321 U. S. 503; *Yakus* v. *United States,* 321 U. S. 414).

(10) In view of our previous discussion, no extended comment is necessary to the tenth reason of the court below that the "maximum price regulations pertinent to this case appear to be intended to limit the profit of a seller (the defendant in this case) to that made by him on comparable transactions during the month of March, 1942" (R. 24–25).

It is significant that although the court below assigned these ten reasons for arriving at his conclusion, when it came to filing its findings of fact, it did not say that the facts referred to in the reasons set forth in its *memorandum* are adopted as the facts in the case. Instead, the court merely declared that "the facts set forth in said *stipulation* are adopted as the facts upon which the decision of this Court are based" (R. 26–27). As we have shown, the stipulated facts do not have a single word in them to the effect that "* * * The defendant's new supplier's maximum price as fixed by the Office of Price Administration included return freight on empty beer bottles and such new supplier properly charged return freight on empty beer bottles" (Reason 2, R. 23). Moreover, it will be noted that the District Court does not go so

far as to say that the defendant's new supplier's maximum price as fixed by the Office of Price Administration included not only return freight, but likewise, broker's commissions and finder's fees. As to the latter charges, the court merely declared that "broker's or finder's fees were not prohibited * * *" (Reason 5, R. 24), although there is nothing in the stipulated facts to support this statement either. The regulation forbade these brokerage charges, if not expressly, at least indirectly, by establishing as a maximum price those prices set forth in Section 1420.66 Appendix A, plus the "permitted increase" for *excise taxes only*. Hence, brokerage charges and finder's fees were not included in the "permitted increases," no more than return freight on empties, until the Office of Price Administration granted authority to do so, and this authority defendant failed to show was given.

In this connection it should also be noted that in his answer, defendant did not rely on the defense that the new supplier's maximum prices as fixed by the Office of Price Administration properly included the disputed charges. There, defendant merely denied the charges of violation; in general claimed that its sales were made at maximum prices; and then alleged that its prices "were computed in accordance with the business and cost practices established * * * in the industry *prior* to the enactment of said Emergency Price Control Act * * *" (R. 8–9). In view of the authorities cited at p. 20, this latter defense was of course plainly lacking in merit; as were also those

contentions adopted by the court below that defendant's right to profit was entitled to protection during a period of emergency.

## CONCLUSION

The court below was clearly wrong as a matter of law in dismissing that portion of the complaint which charged defendant with violating the regulation by including in his prices the cost of returned freight on empty containers, broker's commissions and finder's fees. To that extent, it is respectfully submitted that the judgment below should be reversed with instructions to enter judgment for the full amount of the overcharges as stipulated in the record on appeal.

Respectfully submitted.

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# APPENDIX

## Applicable Provisions of Act

Sec. 205 (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum

price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.

## Applicable Provisions of Regulations

### [A] *Maximum Price Regulation 259* (*7 F. R. 3153*)

Sec. 1420.51. *Prohibition against sales of domestic malt beverages above maximum prices.* On and after November 1, 1942, regardless of any contract, agreement, lease or other obligation:

(a) No person shall sell or deliver any domestic malt beverages higher prices than the maximum prices set forth in Appendix A (§ 1420.66) of this Maximum Price Regulation No. 259. * * *

(c) No person shall agree, offer, solicit or attempt to do any of the foregoing: * * *

Sec. 1420.53. *Applicability of the General Maximum Price Regulation and other regulations or orders.* (a) The provisions of this regulation supersede the provisions of the General Maximum Price Regulation with respect to sales and deliveries of domestic malt beverages for which maximum prices are established by this Regulation. However, this regulation shall not apply to sales of domestic malt beverages at retail in any area in which maximum prices for such sales have been or are hereafter fixed by the Regional Administrator or District Director of the Office of Price Administration in that area by special order is-

sued under General Order No. 50, or by any restaurant maximum price regulation. * * *

SEC. 1420.57 *Evasion.* (a) The price limitations set forth in this Maximum Price Regulation No. 259 shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale or delivery of, or relating to the sale of domestic malt beverages alone or in connection with any other commodity, or by way of commission, service, transportation, or any charge, or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise. * * *

SEC. 1420.66 Appendix A—(a) *For manufacturers and wholesalers.* The maximum price which a manufacturer or wholesaler may charge for a domestic malt beverage, except in 32-ounce containers, shall be the highest price charged by him for such domestic malt beverage during the period October 1 to 15, 1941, inclusive, plus the "permitted increase" set forth in the schedule of permitted increases in paragraph (c) (1) of this section, or the maximum price now established by such manufacturer or wholesaler under the pricing provisions of the General Maximum Price Regulation, plus the "permitted increase" for excise taxes only as specified in paragraph (c) (2) of this section.

*Provisions of Revised Maximum Price Regulation 259 (9 F. R. 14537, 15107)*

SEC. 1.2 (n) *Transportation charges.* "Transportation charges" means the specific allowance provided in this regulation for the particular movement of the malt beverage being priced, or where no such allowance is provided, lawful charges of the cheapest available common or contract carrier for movement of the malt beverage being priced by the most direct route

from the seller's shipping point to the purchaser's customary receiving point. The term includes any applicable Federal tax on transportation now or hereafter imposed. However, charges for local hauling or handling are excluded.

SEC. 5.9 *Compliance with this regulation*—(a) *No selling or buying above maximum prices.* Regardless of any contract or obligation, no person shall sell or deliver, or buy or receive in the course of trade or business, any malt beverage at a price higher than the maximum price established by this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, a price lower than the maximum price may be charged or paid.

(b) Evasion. (1) No person shall evade a maximum price directly or indirectly, by any practice or device in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to any malt beverage either alone or in connection with any other commodities or services, by commission, brokerage or finder's fee, service, transportation or other charge or discount, premium or other privilege, by tying or tie-in agreement, long term contract, combination sale or trade understanding, by any change in style or manner of packing, by a business practice relating to containers, or by any other means.

(2) The following transactions or acts constituting violations or evasions of this regulation are prohibited:

(i) Changes in kinds, grades and proportions of ingredients resulting in depreciation of the quality of a malt beverage other than as the result of a normal variation;

(ii) The reduction or elimination of a brewer's customary discounts, allowances or price differentials;

(iii) Making a separate charge by a seller to a purchaser for local hauling or handling, loading or un-

loading, for breakage of barrels, containers or cases, for reconditioning barrels, containers or cases, or for hauling or handling empty barrels, containers or cases.

[B] *General Maximum Price Regulation (7 F. R. 3153)*

§ 1499.1 *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No "person" shall "sell" or deliver any "commodity", and no person shall sell or supply any "service", at a price higher than the maximum price permitted by this General Maximum Price Regulation; and

§ 1499.2 *Maximum prices for commodities and services: General provisions.* Except as otherwise provided in this General Maximum Price Regulation, the seller's maximum price for any commodity or service shall be:

(a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:

The highest price charged during such month by the most closely competitive seller of the same class—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

"Highest Price Charged During March 1942"

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942; or

(b) If the seller made no such delivery or supplied no such service during March 1942 his highest offering price for delivery or supply during that month.

No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price. The "highest price charged" shall be a price charged during March 1942 to a purchaser of the same class. But if during March 1942 a seller (1) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (2) raised his general level of prices, but thereafter during March 1942 made no delivery to any purchaser of a particular class he shall, for that particular class of purchasers calculate the highest price charged by taking the highest price charged during March 1942 to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differentials. No seller shall require any purchaser, and no purchaser shall be permitted, to pay a large proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

"Similar Commodities or Services"

One commodity shall be deemed "similar" to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed "similar" to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

§ 1499.3 *Maximum prices for commodities which cannot be priced under § 1499.2.* The seller's maximum price for a commodity which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

(a) *Sales at wholesale or retail.* In the case of a sale at wholesale or retail, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under § 1499.2 of this General Maximum Price Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his replacement cost of that commodity; and (3) shall multiply the percentage so obtained

by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the appropriate field office of Price Administration upon a form, duly filled out and signed under oath or affirmation, copied from the form contained in § 1499.24, Appendix A, of this General Maximum Price Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

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